UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

PITNEY BOWES GOVERNMENT
SOLUTIONS, INC.[1]

Employer,

and Case 27-RC-8440

AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Petitioner.

DECISION AND DIRECTION OF ELECTION

On April 6, 2006, American Postal Workers Union, AFL-CIO, (the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act, as amended, (the Act) seeking to represent all full-time and part-time workers employed by Pitney Bowes Government Solutions, Inc., (the Employer), at its facility in Aurora, Colorado, excluding office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act and all other employees. On April 18, 2006, a hearing was conducted before a Hearing Officer of the National Labor Relations Board (the Board). At the hearing, the parties agreed that the following employees constituted an appropriate unit for the purposes of collective bargaining: all full-time and regular part-time production, maintenance and warehouse employees employed by the

[1] At the hearing, the Employer represented this to be its correct name.

Employer at its Aurora, Colorado facility, including container repair mechanics, container repair parts clerks, conveyor belt loaders, dispatchers, facility maintenance employees, forklift operators, hostlers, truck drivers, inspectors, material handlers, and transporters, excluding office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

This case presents the issue of whether the Petitioner is disqualified from representing the Employer's employees described above because of an asserted conflict of interest. As discussed below, I conclude that the Employer has failed to meet its burden of establishing that the Petitioner has a disqualifying conflict of interest with the Employer and I shall direct an election in the appropriate unit.[2]

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding,[3] I find:

[2] The Employer also seeks a determination regarding the extent to which the Act governs the relationship between the Employer and the Petitioner, assuming that the Petitioner is successful in becoming the certified representative. Specifically, the Employer seeks a determination of whether the interest arbitration provisions of the Postal Reorganization Act would be applicable to its relationship with the Petitioner in the event the Petitioner becomes the certified representative. I find this issue to be irrelevant to my determination of whether an election should be conducted in the unit found appropriate herein. Accordingly, I decline to determine an issue not presently before me or the Board.

[3] Post hearing briefs in this case were due on May 3 and both parties filed briefs. Prior to May 3 the Petitioner contacted the Regional Office to inquire about filing it's brief by facsimile and was incorrectly informed that it could do so. It filed its post-hearing brief by facsimile and e-mail on May 3. The Region did not receive a copy of the Petitioner's brief, filed by courier, until May 4. The Employer has filed a Motion to Strike Petitioner's Brief with the Acting Regional Director dated April 4 (Motion to Strike) asserting that the Petitioner's Post Hearing Brief is untimely. Section 102.114(g) of the Board's Rules and Regulations specifically provides that facsimile transmission of briefs will not be accepted. While I regret that Regional Office personnel provided the Petitioner with incorrect information about facsimile filing, the Board's Rules and Regulations specifically prohibit such filing and the Rules and Regulations are controlling. Nor was the Petitioner's filing of its post-hearing brief by electronic transmission proper. The Board's "E-Filing Project" allows certain documents to be filed with the Executive Secretary's Office electronically, however, that Project has not been expanded to include documents filed with a Regional Director. Specifically Memorandum OM 05-30, dated January 12, 2005 and released to the public, re-states that representation case documents filed with a Regional Director may not be filed electronically. In its Opposition to the Motion to Strike, Petitioner's Counsel requests that if the Acting Regional Director finds that its post-hearing brief is untimely, the Region should consider its Opposition to be a request to file

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a Delaware corporation engaged at its Aurora, Colorado facility as a private contractor of the United States Postal Service. The Employer is engaged in the business of inspecting, repairing, placing in inventory, and preparing for dispatch mail transportation equipment such as mail bags, tubs, trays and wheeled containers. During the last calendar year, the Employer had gross revenues in excess of $50,000 from sales or performance of services directly to customers outside the State of Colorado. Based on these facts, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board.[4]

3. The Employer declined to stipulate that the Petitioner is a labor organization within the meaning of the Act. In spite of this, the Employer conceded on the record that the Petitioner is a labor organization with respect to its relationship with the United States Postal Service. It appears that the

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its brief out of time as provided in "Section 102.11 (b)(2)" of the Board's Rules and Regulations. Section 102.111(c)(2) of the Board's Rules and Regulations does provide for filing briefs out of time in representation cases based on excusable neglect. I have considered each party's arguments on this issue, including Petitioner's counsel's declaration that he did not use the Employer's brief in preparation of its brief. Based on all of the circumstances in this case, I will reject the Petitioner's Motion to File its Brief Out of Time based on the specific provision of the Board's rule and grant the Employer's Motion to Strike the Petitioner's Brief.

[4] Since it is subject to the Service Contract Act which provides that the Department of Labor will issue area-wage determinations that set forth the minimum wages and benefits to be provided to employees of service contractors, the Employer contends that this raises an issue as to whether the parties are capable of engaging in meaningful collective bargaining and, therefore, whether the Board should assert jurisdiction over the Employer. However, it is well established that in determining whether it should assert jurisdiction, the Board will only consider whether the employer meets the definition of "employer" under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards. *Management Training Corporation*, 317 NLRB 1355, 1358 (1995). Based on the stipulation of the parties,

Employer's reluctance to stipulate to the labor organization status of the Petitioner is related to its position that the Petitioner should be disqualified from representing the Employer's employees because of an alleged conflict of interest. At any rate, the record shows that the Petitioner is an organization in which employees participate and which exists for the purpose of dealing with employers, most notably the United States Postal Service, concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following group of employees:

> **INCLUDED:** all full-time and regular part-time production, maintenance and warehouse employees employed by the Employer at its Aurora, Colorado facility, including container repair mechanics, container repair parts clerks, conveyor belt loaders, dispatchers, facility maintenance employees, forklift operators, hostlers, truck drivers, inspectors, material handlers, and transporters.
> **EXCLUDED:** office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

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it is clear that the Employer meets these requirements and I find that the Employer is properly subject to the Board's jurisdiction.

The Facts

The Employer is engaged at its Aurora, Colorado facility in the business of processing and repairing mail transport equipment, including mail bags, trays, tubs, sleeves and wheeled containers. It performs this work pursuant to a contract with the United States Postal Service (USPS). The contract with USPS is a 10-year contract which began in 1998. The contract was in four phases – a 5-year phase, two 2-years phases and a 1-year phase. The second 2-year phase is scheduled to expire in March 2008. The work pursuant to this contract was initially performed by DDD Company, a private contractor. The Employer acquired DDD Company in November 2003 and took over the performance of the contracted work. It has performed this work since that time and currently employs approximately 70 employees at its facility. All of the work performed at the Aurora facility is pursuant to the Employer's contract with USPS.

The Employer alleges that the Petitioner has a conflict of interest which arises from its representation of USPS' employees and its opposition to subcontracting USPS' work to private sector contractors such as the Employer. The Employer contends that this alleged conflict of interest disqualifies the Petitioner from representing employees of the Employer who perform work pursuant to a contract with USPS. According to the Employer, the Petitioner cannot serve both the interests of the Employer's employees, who would benefit from work subcontracted by USPS, and the USPS' employees, who might be harmed by the subcontracting of work they now perform.

In support of its contention, the Employer offered evidence showing that in 2002 the Petitioner's president issued a statement opposing privatization or outsourcing of USPS work to private contractors.[5]

Analysis and Conclusions

Even assuming, as alleged by the Employer, that the Petitioner opposed privatization and subcontracting of USPS' work to private contractors, I find no merit to the Employer's contention that the Petitioner has a disabling conflict of interest in representing the Employer's employees.

"It is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be

[5] On or about April 13, 2006, the Employer served a subpoena duces tecum on Tony Olson, the Petitioner's organizer, seeking additional documentary evidence setting forth the Petitioner's position on the issue of USPS' subcontracting of work to the Employer or other private contractors. The record establishes that no witness fee was tendered with the subpoena. Mr. Olson did appear, without waiving his position that the subpoena was improperly served, and testified that he did not possess any of the documents requested in the subpoena. Since the subpoena was addressed to Mr. Olson individually and not to the keeper of the records, it appears that Olson fully complied with the subpoena. Because the record does not establish that a witness fee was tendered with the subpoena there is insufficient evidence to establish that the subpoena was served in compliance with the Board's rules. See Sec. 102.66 (f) of the Board's Rules and Regulations. On this basis alone the subpoena is not subject to enforcement.

At the conclusion of the hearing in this matter, the Hearing Officer ruled that the requested information was not relevant and he refused to order the Petitioner to produce this information. I hereby affirm the Hearing Officer's ruling. As noted above, the Employer produced evidence at the hearing showing the Petitioner's opposition to the outsourcing and subcontracting of USPS work to private contractors such as the Employer. The information requested by the Employer's subpoena and the record representation of the purpose for which it was sought is of the same nature as that already produced by the Employer, that the Petitioner generally opposes subcontracting. Accordingly, this requested information would have been cumulative and the Hearing Officer correctly refused to order that it be produced. As discussed infra, information of this general character would not establish a clear and present danger to the rights of employees by an overt act that establishes a disabling conflict.

On April 20, 2006, the Employer raised this same subpoena issue in a pleading filed with the Region and accompanied by documentary evidence submitted as an offer of proof. I reject this pleading and the attached offer of proof for the reasons stated above and also because it was untimely filed. The record establishes that the Hearing Officer left the record open until the close of business on April 20 only for the limited purpose of the receipt of the Petitioner's Constitution and Bylaws. This did not give the Employer leave to file extra record pleadings or evidence which could have been submitted during the hearing. Finally, the Employer again attempted to raise this same issue on April 24, 2006 when it filed with the Region a request for special permission to appeal the ruling of the Hearing Officer concerning its

jeopardized. In order to find that a union has a disabling conflict of interest the Board requires a showing of a 'clear and present' danger interfering with the bargaining process. The burden on the party seeking to prove this is a heavy one." *CMT, Inc.*, 333 NLRB 1307 (2001).

In *Bausch & Lomb Optical*, 108 NLRB 1555 (1954), the Board found that the employer had met this heavy burden by showing that the union owned and controlled a business enterprise in the same industry and locality as the employer and in direct competition with the employer. In these circumstances, the Board found that there was an "innate danger" that the union would be tempted to bargain with the employer based, not on the interests of the employees it represented, but rather on the interests of its competing business. The "unique" circumstances presented by *Bausch & Lomb* are clearly not present here. There is no evidence, nor allegation, that the Petitioner is engaged in the operation of a competing business in the same industry as that of the Employer. Instead, the situation presented here involves a union seeking to represent employees of different companies who have a business relationship with each other. As the Board noted in *CMT, Inc.*, supra at 1308, "this situation is far from unique."

In *CMT, Inc.*, supra at 1308, the Board also stated that "[a]s a general proposition, the 'conflict of interest' doctrine has not been applied to restrict employees from selecting a bargaining representative solely because the labor organization represents both employees of an employer and the employees of a

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subpoena. This request for special permission to appeal the ruling of the Hearing Officer is denied for the same reasons stated above.

subcontractor doing business with their employer." As the Board further noted, there are two cases in which it has found a conflict of interest where the union represented employees of both the employer and its subcontractor – *Catalytic Industrial Maintenance Co.*, 209 NLRB 641 (1974) and *Valley West Welding Co.*, 265 NLRB 1597 (1982). In both of those cases, the Board found that the union had committed an "overt act" showing that it was working at cross purposes with its duty to represent the subcontractor's employees and thus presenting a proximate danger of infecting the bargaining process. Thus, in *Catalytic Industrial Maintenance Co.*, supra, the union there represented employees performing maintenance work pursuant to a subcontract with another company, Oxochem. In negotiations with Oxochem, the union sought to eliminate the subcontracting of the work and the transfer of Catalytic's bargaining unit employees to Oxochem. The Board found that this conduct constituted an "overt act" because the union sought not only the rescission of the subcontract but also the dissolution of the employer's bargaining unit. In *Valley West Welding Co.*, supra, the union represented employees performing work under a subcontract with Consolidated Aluminum Corporation (Conalco). The Board excused the employer's withdrawal of recognition from the union after the union had committed the overt act of obtaining Conalco's agreement to limit the subcontracting, thus resulting in a loss of work for the employer's employees.

Unlike the situations in *Catalytic* and *Valley West*, the Board in *CMT, Inc.*, supra, found that the union there had not committed an overt act evincing a proximate danger of infecting the bargaining process. In *CMT*, the union sought

to represent a unit of inner-city and over-the-road truck drivers employed by the employer who performed transportation services for USPS pursuant to a subcontract. The union also represented employees of USPS, including inner-city drivers, pursuant to a national agreement. The union had filed several related grievances concerning work contracted out by USPS. An arbitrator found that USPS had, in fact, violated the national agreement between it and the union and remanded the grievances to the parties to attempt to fashion an appropriate remedy. In the subsequent discussions, the union proposed that the contracted work be returned to USPS.

The Board found *Catalytic* and *Valley West* to be distinguishable from the facts presented in *CMT*. First, the Board found that the union's proposal would not result in a significant loss of work to the bargaining unit as a whole because the arbitration award involved only the inner-city drivers and did not involve the 260-275 over-the-road drivers in the petitioned-for unit. Second, the Board found that, unlike *Catalytic* and *Valley West*, any alleged conflict of interest was speculative and did not present a "clear and present" danger because the union was not the certified representative of the bargaining units. The Board found this distinction to be significant since, should the union become the certified representative of the employer's employees, it would no longer be faced with the possibility of USPS subcontracting the work to a non-union contractor. In that circumstance, the Board concluded that the union's interest in seeking to remove the subcontracted work may well cease to exist. Thus, the Board found that the likelihood that the union would continue to pursue the removal of the

subcontracted work from the employer post-certification was far too speculative to warrant disqualifying the union from seeking to represent bargaining unit employees. Finally, the Board found that the employees were in the best position to decide if representation by the union would serve their interests and they could make that decision by casting their ballots for or against the union.

Based on the same considerations which the Board found significant in *CMT*, I find that this case is distinguishable from *Catalytic* and *Valley West*, and that the facts do not warrant disqualifying the Petitioner from seeking to represent the Employer's employees in the appropriate unit. Thus, the Petitioner has done no more than state its philosophical opposition to the subcontracting of USPS work. The Petitioner has not sought dissolution of the Employer's entire bargaining unit nor has it succeeded in, or even attempted to, remove subcontracted work from the Employer. It has taken no action specifically directed at the Employer's operations which could result in any loss of work to the bargaining unit employees.

Moreover, as was the case in *CMT*, the Petitioner is not presently the certified representative of the Employer's employees. Should it become the certified representative, the likelihood that it would then pursue the removal of the subcontracted work from bargaining unit employees whom it represents is too speculative to justify the Petitioner's disqualification. There is simply insufficient evidence to show that the Petitioner would follow such a course.

Finally, as found by the Board in *CMT*, it is the employees of the Employer who are in the best position to decide if representation by the Petitioner will serve

their interests. They can express their positions by casting their ballots for or against the Petitioner in the representation election.

In sum, I find that the Employer has failed to meet its burden of showing a clear and present danger of interference with the bargaining process from a disqualifying conflict of interest on the part of the Petitioner. Accordingly, I do not disqualify the Petitioner from representing the employees in the unit found appropriate and I shall direct an election in this unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.[6] Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States Government may vote if they appear in person at

[6] Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the designated payroll period: who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by:

AMERICAN POSTAL WORKERS UNION, AFL-CIO[7]

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-

[7] Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **May 25, 2006**. In accordance with Section 102.67 of the Board's Rules and

5433, on or before **May 18, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Dated at Denver, Colorado, this 11th day of May, 2006

Michael W. Josserand, Acting Regional Director
Michael W. Josserand, Acting Regional Director
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433

Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.